SUPREME COURT, U. S.

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FILED
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JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1960.

No. 35

UNITED GAS PIPE LINE COMPANY,
Petitioner,
vs.
IDEAL CEMENT COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

SUPPLEMENT TO BRIEF FOR RESPONDENT IN OPPOSITION.

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SUPPLEMENT TO BRIEF FOR RESPONDENT IN OPPOSITION.

Respondent, IDEAL CEMENT COMPANY, respectfully says that the petition for writ of certiorari should be denied because it was not timely filed.

SUMMARY STATEMENT OF REASON FOR FILING SUPPLEMENTAL BRIEF

As a supplement to the brief of Respondent in opposition to the petition for writ of certiorari, which said brief in opposition was filed in this Court on, to-wit, March 13, 1961, Respondent wishes to raise a jurisdictional question omitted from its original brief.

JURISDICTIONAL QUESTION INVOLVED

On September 2, 1960, the United States Court of Appeals for the Fifth Circuit rendered its original opinion in this case reversing the judgment in favor of Petitioner by the United States District Court for the Southern District of Alabama (reported at 282 F. 2d 574). Within twenty-one (21) days from the entry of the judgment, Petitioner filed its first petition for rehearing which was denied by the Court of Appeals on October 5, 1960, in its per curiam opinion reported at 282 F. 2d 580. On October 20, 1960, Petitioner filed in the Court of Appeals an application for leave to file a second petition for rehearing, a copy of which application is appended.

The pertinent portion of Rule 19 of the Rules of the United States Court of Appeals for the Fifth Circuit provides as follows:

> "A petition for rehearing may be presented only within 21 days after entry of judgment, unless by special leave granted by the Court, or one of the Judges . . ."

The first petition for rehearing was admittedly filed within the 21 day period allowed by Rule 19. The application for leave to file a second petition for rehearing was not filed until approximately 47 days after entry of the judgment and there was never issued by the Court of Appeals or any of its Judges an order granting the motion for leave to file a second petition for rehearing. This fact has been verified with the office of the Clerk of the Court of Appeals for the Fifth Circuit.

The Court of Appeals did, however, in denying

the second petition for rehearing, write a two paragraph per curiam opinion which is reported at 282 F. 2d 580, a copy of which is appended.

In addition to the above, Petitioner also filed in the Court of Appeals on, to-wit the 21st day of December, 1960, a "motion by appellee to further stay of mandates and to fix effective date of judgments". It has been confirmed with the office of the Clerk of the Fifth Circuit Court of Appeals that an order granting the motions was entered by the Court on December 27, 1960, and the effective date of its judgment in this case was declared to be November 16, 1960, the date on which the second petition for rehearing was denied.

It is well settled that a Court cannot take action which amounts to allowing appeals or petitions for writs of certiorari to be initiated outside the time limit prescribed by statute or applicable rules, the reason being that the timeliness of appellate action is jurisdictional. **George vs. Victor Talking Machine Company**, 293 US 377, 79 L. Ed. 439. Therefore, the mere fact that the Court of Appeals granted an order fixing the effective date of its judgment as November 16, 1960, is not controlling if the petition for second rehearing was not timely filed. In such a case, the Court of Appeals would be powerless to extend the effective date of its judgment beyond October 5, 1960, the date the first petition for rehearing — which was timely filed — was denied.

The fact that the Court of Appeals wrote brief opinion after the filing of the application for leave to file a second petition for rehearing does not of itself extend the effective date of the judgment

for the reason that the Court, in its opinion of November 16, 1960, did not disturb, revise or alter in any way its decision which by its prior judgment has been plainly and properly settled with finality. In no was does the contents of the second per curiam opinion affect the matter sought to be reviewed by Petitioner in its petition for certiorari. The second per curiam opinion is an immaterial clarification which does not change the judgment previously rendered and which does not extend the affective date of judgment. See **Federal Trade Commission vs. Minneapolis-Honeywell Co.**, 344 US 206, 97 L. E. 245.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be denied on a jurisdictional basis because it was not timely filed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, MARION R. VICKERS, one of the attorneys for IDEAL CEMENT COMPANY, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 14th day of March, 1961, I served copies of the foregoing supplement to the brief of Respondent in opposition on United Gas Pipe Line Company, Petitioner herein, by mailing the same in duly addressed envelopes, with first class postage prepaid, to its attorneys of record as follows:

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GEORGE E. STONE, JR.
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APPENDIX "A"

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

NO. 18,103

IDEAL CEMENT COMPANY,

Appellant,

vs.

UNITED GAS PIPE LINE COMPANY,

Appellee.

No. 18,118

SCOTT PAPER COMPANY,

Appellant,

vs.

UNITED GAS PIPE LINE COMPANY,

Appellee.

Appeals from the United States District Court for The Southern District of Alabama

APPLICATION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING

Appellee United Gas Pipe Line Company, respectfully requests leave to file its second petition for rehearing. Twenty copies of the printed petition with supporting brief are filed herewith.

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Attorneys for Petitioner-Appellee
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Of Counsel

I hereby certify that copies of the foregoing application for leave to file a second petition for rehearing were this day served by mail on the following:

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Mr. William H. Burton, Legal Division
Department of Revenue, State of Alabama
Montgomery, Alabama.

I further certify that copies of the printed petition for rehearing and of the brief in support are being served by mail on the above listed attorneys by the printer, E. S. Upton Printing Company of New Orleans.

This 20th day of October, 1960

/s/ E. DIXIE BEGGS
Of Counsel for Appellee

APPENDIX "B"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18103

IDEAL CEMENT COMPANY,

Appellant,

versus

UNITED GAS PIPE LINE COMPANY,

Appellee,

No. 18118

SCOTT PAPER COMPANY,

Appellant,

versus

UNITED GAS PIPE LINE COMPANY,

Appellee,

Appeals from the United States District Court for The Southern District of Alabama.

(November 16, 1960)

ON SECOND PETITION FOR REHEARING.

Before RIVES, Chief Judge, and JONES and WISDOM, Circuit Judges.

PER CURIAM: To clear up any ambiguity which may remain in our opinion and holding, we intended to hold and do hold that the Mobile City license tax is inapplicable as to gross receipts for the gas distributed by United directly to Ideal and Scott. In our opinion, however, the tax is applicable to the gross receipts of the local distributor, Mobile Gas Service Corporation.

United properly reimbursed Mobile Gas for the increased taxes paid by Mobile Gas on account of distributions to Ideal and Scott pursuant to United's contract with Mobile Gas.

The second petition for rehearing is

DENIED.